No. 21307

# United States Court of Appeals

FOR THE NINTH CIRCUIT



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| FLUOR CORPORATION, LTD, ET AL | No. 21307 |
| UNION TANK CAR COMPANY | No. 21307 A |
| DRAGOR SHIPPING CORPORATION, a corporation, formerly Ward Industries Corporation, | No. 21307 B |
| *Appellants Cross Appellees* | |
| vs. | |
| U. S. A., EX REL MOSHER STEEL COMPANY, | No. 21307 C |
| *Appellee Cross Appellants* | |

## OPENING BRIEF OF CROSS APPELLANT UNITED STATES OF AMERICA FOR THE USE OF MOSHER STEEL COMPANY AND MOSHER STEEL COMPANY

Upon Appeal from the District Court of the United States, for the District of Arizona

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## OPENING BRIEF OF CROSS APPELLANT UNITED STATES OF AMERICA FOR THE USE OF MOSHER STEEL COMPANY AND MOSHER STEEL COMPANY

Upon Appeal from the District Court of the United States, for the District of Arizona

The plaintiff-appellee, United States of America for the use of Mosher Steel Company, and Mosher Steel Company as cross-appellants, cross appeal from that portion of a final judgment in its favor, dated and entered May 24, 1966, against the defend-

R refers to Record on Appeal
RT refers to Reporter's Transcript of Testimony

ants Fluor Corporation, Ltd.; Federal Insurance Company; Vigilant Insurance Company; Insurance Company of North America; General Insurance Company of America; Seaboard Surety Company; America Re-Insurance Company; Employees' Re-Insurance Group, and General Re-Insurance Group (hereinafter called "Sureties"), in the sum of $246,-165.96 together with interest at the rate of six percent per annum from May 24, 1966 until paid, and against Defendants Dragor Shipping Corporation, formerly Ward Industries Corporation, and Union Tank Car Company in the sum of $268,882.92, with interest at the rate of six percent per annum from May 24, 1966 until paid, which judgment as aforesaid fails to award pre-judgment interest to the plaintiff.

## JURISDICTIONAL STATEMENT

Jurisdiction of the cross appeal exists by virtue of Sections 1291 and 2107, Title 28, U.S.C. Jurisdiction in the District Court exists by virtue of Sections 270(a) and (b) of Title 40, U.S.C., commonly known as the Miller Act, as to Count I of the Amended Complaint, and upon Section 1332, Title 28 U.S.C., on Counts II through VII of the Amended Complaint. (R. 2, p. 268). The court, in its Conclusions of Law No. 1 (R. 6, p. 1237), found jurisdiction asserted by the plaintiff against all defendants. None of the defendants attacked the jurisdiction of the District Court.

## STATEMENT OF THE CASE

The Use Plaintiff, Mosher Steel Company, brings this action against defendants Union Tank Car Company, Ward Industries, Inc. and Fluor

Corporation, Ltd., and the sureties, for $298,336.58, which it claims is owing it for fabricating certain steel, for furnishing certain steel and for freight charges relating to the delivery of steel used and incorporated in the Titan II Missile Sites, Tucson, Arizona Project, covered by Fluor's contract, Union's subcontract, and IMI-Ward's subcontract, and also to recover from defendants Union and Ward the sum of $22,716.96, which it claims is owing to it for fabricating and furnishing steel and for freight charges in connection with delivering steel used and incorporated into the work at Vandenberg A.F.B. Project covered by Matich Bros. and Sundt's contract, Union's subcontract and IMI-Ward's subcontract. (Findings of Fact No. 13, R. 6, p. 1223).

The court, sitting without a jury, made 52 Findings of Fact and 15 Conclusions of Law which are cited to the record in the trial court and appear in the record in this court (R. 6, pp. 1220-1240). All references in the court's Findings and Conclusions specifically refer to exhibits in evidence or pages of the reporter's transcript of testimony. After taking the case under advisement the court entered judgment (R. 6 p. 1241) against the defendants in accordance with its Order for Judgment dated May 24, 1966 (R. 6, 1240).

For the purpose of this limited cross appeal on the interest matter, the facts pertinent to this cross appeal are set out in digested form, anticipating that the parties will present a fuller statement of the case and pleadings in the appellants' and appellee's briefs.

After the entry of judgment the plaintiff filed a motion pursuant to Rules 52 and 59 of the Rules of Civil Procedure, moving that the court make an ad-

ditional finding that the charges of the plaintiff for the Tucson job were in the liquidated sum of $298,-336.58, and for the Vandenberg job in the liquidated sum of $22,716.96, and by amending Conclusion No. 15 to read as follows:

> Plaintiff is entitled to interest at the rate of 6% per anum beginning thirty (30) days after February 28, 1962, after deducting from the sums due the plaintiff and as set forth in Conclusions 12 and 14, the sum of $52,170.62, which credit is the agreed value of the stock credit mentioned in Conclusion 13 of the Court dated May 24, 1966.

The plaintiff further moved to amend the judgment to provide for interest in accordance with the proposed amended Finding and Conclusion (R. 6, p. 1266).

By minute entry order of June 20, 1966, the court denied the plaintiff's Motion to Amend, as aforesaid (R. 7, p. 1695).

Within the time prescribed, the plaintiff filed its cross appeal to this court (R. 6, p. 1379), with an appeal bond for costs (R. 6, p. 1380).

## SPECIFICATION OF ERROR

The District Court erred in denying cross-appellant Mosher's Motion to Amend the Findings, Conclusions and Judgment to provide for pre-judgment interest commencing thirty (30) days after February 28, 1962.

## THE ISSUE PRESENTED BY THIS CROSS APPEAL

The plaintiff-cross appellant's (hereinafter called Mosher) cause of action is based upon its claim for steel fabricated, furnished and delivered to the missile sites near Tucson, Arizona and Vandenberg A.F.B., California. For the Tucson job com-

plete terms, prices and conditions were negotiated with Mosher. (Finding No. 21; R. 6, p. 1226) (RT. 194; Pltf's. Ex. 1 in Evidence). For the Tucson and Vandenberg jobs the two purchase orders (Jt. Ex. 9 and 10 in Evidence) form the basis for the charges. Finding No. 41 (R. 6, p. 1233) computes the gross amounts owed for the Tucson job in the sum of $298,336.58, and for the Vandenberg site in the sum of $22,716.96. (Jt. Ex. 14 in Evidence). Conclusions of Law 1 through 15 (R. 6, pp. 1237-1240) impose liability, except for the interest sought in this cross appeal, upon each and every defendant mentioned in said Order of Judgment.

Mosher, because of its error in not billing by sites and levels, rebilled and sent new invoices to IMI-Ward, completing this task on January 19, 1962 (Finding No. 46) (R. 6, p. 1235; RT. 366-367). Thereafter billing was made by sites and levels and the last invoice is dated February 28, 1962 (Jt. Ex. 14, 17 and 18 in Evidence). Mosher has conceded in its Motion to Amend (R. 6, p. 1264) that since the terms were "net 30 days" the court may allow interest to commence 30 days after the date of the last invoice of February 28, 1962.

The court, in Finding No. 53 (R. 6, p. 1237) finds that by stipulation of parties *at the trial* (emphasis supplied) that the sum of $52,170.62 (RT. 682) shall be the value of the IMI stock received by Mosher by order of the Referee in Bankruptcy pursuant to a Plan of Arrangement. The court, in Conclusion No. 13 (R. 6, p. 1239) stated that the defendants were entitled to a credit in the amount of $52,-170.62 upon their respective obligations to Mosher, that amount being the agreed value of the stock received by Mosher in the bankruptcy proceedings.

The court, in Conclusion No. 15 (R. 6, p. 1240) stated:

> "Inasmuch as Mosher's claims against all parties are unliquidated until judgment is entered, no interest is recoverable prior to the entry of judgment herein."

## ARGUMENT

### SOLE POINT

**It is urged that the court, in its Conclusion No. 15 (R. 6, p. 1240) has erred in declaring that Mosher's claims against all parties are unliquidated until judgment is entered, and that no pre-judgment interest is allowed. Mosher's position is that the sums were liquidated when invoiced.**

This case was tried by all parties upon the theory that the amounts sought in Mosher's Complaint were not in serious dispute. The dispute arose as to which defendant was liable. Harle picked up the invoices on February 16, 1962 in Dallas, checked them over with Frank Wright, found nothing that he (Harle) and Wright differed on (RT. 924) and agreed with Wright that Mosher's work had been completed and properly performed (RT. 924) and stated "it was an excellent job."

All of the parties hereto could easily calculate the amount due Mosher from the evidence. By way of illustration Union's Tom Harle testified that he was able to compute the amount due on the "first shipment" from (1) the legal freight rate in effect; (2) the shipment weight, and (3) by using a multiplier of 8 cents per pound, being the fabrication cost at the rate of $160.00 per ton for supplied steel. (RT. 885).

The court, in Finding No. 41 (R. 6, p. 1233) has computed the total obligation for the Vandenberg and Tucson jobs in the same amounts sought in the Complaint, being $22,716.96 and $298,336.58, respectively. In addition, these amounts are the identical sums set forth in the statements of account, being Joint Exhibits in Evidence 17 (Tucson Job) and 18 (Vandenberg Job). The invoices, being Joint Exhibit 14, are to the exact cent as itemized in the statements of account.

Mosher's Exhibit 1 in Evidence, being the October 16, 1961 letter, the purchase orders (Jt. Ex. 9 and 10), the invoices for Tucson and Vandenberg (Jt. Ex. 14) and Jt. Ex. 17 and 18, being the statements of account, the inbound and outbound freight charges (Pl. Ex. 6), all serve as the means to calculate and ascertain the exact amount due and owing.

Finding No. 51 (R. 6, p. 1236) finds that the Miller Act letter, statements and invoices were sent to Fluor on March 20, 1962. Thus we have all the parties put on notice of the amount due and the non-payment. All Answers to the Amended Complaint do not allege that any amount is incorrect or in dispute. Each defendant, in essence, just denies any legal liability for the sums alleged to be due and owing.

An inspection of the invoices and statements of account (Jt. 14, 17 and 18) shows the invoices to be computed in accordance with the purchase orders and plaintiff's Exhibit 1, with every invoice itemized on the statements. The purchase orders provide that the terms are "Net 30 days". Mosher is willing to concede that the court may allow interest to commence 30 days after the date of the last invoice, being February 28, 1962. It is submitted that this would avoid computing interest on each invoice under the "Net

30 days" provision and is a fair method insofar as the defendants are concerned.

The defendants have not introduced any evidence disputing any portion of the aforesaid amounts. It is therefore the position of Mosher that it is legally entitled to pre-judgment interest from each defendant, at least on the amount entered in the judgment, and commencing thirty (30) days after February 28, 1962 until paid.

Pre-judgment interest in the Federal Courts is allowable in accordance with the law of the state where the contract is to be performed.

See: U. S. for use of *Weston and Brooker Co.* v. *Continental Casualty,* 303 F.2d 91 (4 CA). In this case (a Polaris Missile case) the invoices of the materialmen made payment due upon delivery. The court therein said:

> "Thus we have a case for a sum certain or at least capable of being reduced to a certainty and payable at definite or definitely ascertainable dates.
>
> "We think the judge could have allowed interest under South Carolina law from the date of each invoice since by their terms they were payable on delivery, and under the terms of this bond (Miller Act) the surety is bound in like manner as the principal. * * * Clearly the court was within the law of South Carolina in allowing interest from thirty days after the final invoice date."

In U. S. for use of *Carter-Schneider-Nelson Corporation V. Campbell,* 293 F.2d 816 (9 CA) the court, under California law, said: "Such pre-judgment interest is recoverable only if damages are certain or capable of being made certain by calculation." This rule is followed in the Arizona case of

*United States F. & G. Co. v. California-Arizona Const. Co.,* 21 Ariz. 172, 186 P. 502, wherein the court said:

> "It is apparent, therefore, that this is not a case where the amount of the recovery, if recovery be had, was definitely fixed by agreement of the parties or capable of ascertainment by mere computation. In that class of cases, in the absence of special contract, the *general rule is that interest should be computed from the time the debt became due.*" (emphasis supplied).

The Arizona court, in *Palmcroft Development Co. vs. City of Phoenix,* 46 Ariz. 400, 51 P.2d 921, stated that when debts are due they bear interest at the legal rate and in regard to a "liquidated" debt said:

> "The debt is a liquidated debt and under the general rule bears interest from the date it should have been paid. Where there is no agreement for interest, interest is allowed as damages for the withholding of the money from the creditor after it is due and is, we believe, universally fixed at the legal rate."

In the case of *Continental Oil Company v. U. S.,* 184 F. 2d 802 at page 822 (9 CA), the court stated:

> "* * * since the amounts found were fixed and ascertainable we think the award of interest was justified under either rule."

The term liquidated has been judicially defined to mean that the amount due has been ascertained and agreed upon by the parties or is fixed by operation of law. See: 25 Word and Phrases, pages 542, et seq.

The Arizona Code section on interest, 44-1201 A.R.S. 1956, reads as follows:

> "A. Interest for any legal indebtedness shall be at the rate of six dollars upon one hun-

dred dollars for a year, unless a different rate is contracted in writing."

In the case of *J. F. White Engineering Corp. v. U. S. for the use of Pittsburg Plate Glass,* 311 F.2d 410 (10 CA), the court sustained an award of interest to a subcontractor who had substantially complied from the date that the balance became due.

In the case of *Continental Casualty v. Allsop Lumber Co.,* 336 F.2d 445 at 458 (8 CA), the court indicated that the contract and the invoices provided for interest at 6% if payment is not made within 30 days after payment is due and remanded the case to the District Court to provide for prejudgment interest.

In the case of *Sam Macri and Sons, Inc. v. U. S. A. for the use of Oaks,* 313 F.2d 119 (9 CA), this court therein affirmed the allowance of interest on an amount admittedly due under subcontract from the date the amount became due even though the prime contractor's unliquidated counterclaim exceeded that amount. After trial the amount of the counterclaim actually sustained was less than the judgment awarded the subcontractor. This situation is similar to the credit of $52,170.62 allowed in Finding No. 52 (R. 6, p. 1237).

The court also stated in the Macri case that the surety's liability coincides in time with that of the principal, and does not begin, as to interest, when demand is made.

A more recent Ninth Circuit Court case is *American Surety Company of New York v. United States of America For the Use and Benefit of B & B Drilling Company,* 368 F.2d 475 (1966) 9 C.A. This Miller Act action involved a claim certain which was re-

duced by reason of an unliquidated setoff for counterclaim thereto. This court stated therein at 479:

> "Of course the set-offs which were allowed to McBride were for amounts which were unliquidated. That, however, does not alter or diminish the plaintiff's right to recover the interest which was here allowed. It is a general rule that where the amount of a claim is certain, as here, but is reduced by reason of an unliquidated set-off or counterclaim thereto, interest is properly allowed on the amount found to be due from the time it became due and was demanded."

It is urged that this case and the Macri case are presuasive of Mosher's position that pre-judgment interest is allowable in this action.

## CONCLUSION

The District Court erred in failing to grant Mosher prejudgment interest, and it is respectfully submitted that the judgment should be amended or modified to provide for interest at the rate of 6% per annum commencing thirty (30) days after February 28, 1962.

Respectfully submitted,

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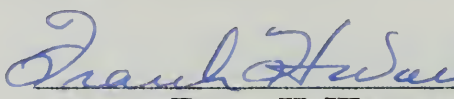
## CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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